Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 31, 1995

Ms. Laura S. Groce
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Great Hills Plaza
9600 Great Hills Trail, Suite 300 West
Austin, Texas 78759-6303

OR95-168

Dear Ms. Groce:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29443.

Northeast Texas Community College (the "college"), which you represent, received a request for any and all documents concerning the performance of a specific faculty member regarding allegations of alleged sexual harassment and the faculty member's personnel file. The college received the request on September 22, 1994. By letter dated September 27, 1994, you contend that the college "has no duty at this time to produce the materials requested as they are exempt from disclosure pursuant to the litigation exception, the interagency memoranda exception and the informal investigative exceptions to the open records act." In a subsequent letter dated October 21, 1994, counsel for the college claims that files and communications between an attorney and client are not open to the public.

Section 552.301 of the Open Records Act provides that:

> (a) A governmental body that receives a written request for information that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental

> body must ask for the attorney general's decision within a reasonable time but not later than the 10th calendar day after the date of receiving the written request.
>
> (b) A governmental body that wishes to withhold information must submit written comments stating the reasons why the information should be withheld.

Section 552.302 provides that:

> If a governmental body does not request an attorney general decision as provided by Section 552.301(a), the information requested in writing is presumed to be public information.

Where requests are not made within ten days, the information is presumed to be public. Open Records Decision No. 319 (1982). A governmental body must show a compelling reason to overcome this presumption, for example, that the information is confidential under some other source of law or that third-party privacy interests are at stake. *Id.*; *see Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). A governmental body may not raise additional exceptions after the ten-day deadline, including a request for reconsideration, absent a showing of compelling interest. Open Records Decision No. 515 (1988). Moreover, the mere fact that the information is within the attorney-client privilege and thus would be excepted from disclosure under section 552.107(1) of the Open Records Act if the governmental body had made a timely request for an open records decision does not alone constitute a compelling reason to withhold the information from public disclosure. Open Records Decision No. 630 (1994).

Furthermore, the Open Records Act places on a governmental body the burden of establishing why and how an exception applies to requested information. Open Records Decision Nos. 542 (1990); 532 (1989). A general claim that an exception applies to an entire report, when the exception is clearly not applicable to all information in the report, does not comply with the Open Records Act's procedural requirements. Open Records Decision Nos. 419 (1984); 252 (1980). The Attorney General is not authorized to raise exceptions on behalf of a governmental body, except for section 552.101. Open Records Decision Nos. 481, 480, 470 (1987); 344, 325 (1982).

The letter to this office raising the attorney-client privilege was submitted after the ten-day deadline. Accordingly, the college has waived section 552.107(1). Moreover, we do not understand which exceptions the college intended to raise as the "informal investigative exceptions." As you do not explain how these exceptions apply or indicate which documents they apply to, we have no basis on which to withhold the documents from required public disclosure. The only distinguishable exceptions that you have raised within the ten-day deadline are sections 552.103 and 552.111 of the Government Code.

The requested information does, however, contain information that is protected from required public disclosure under section 552.101. Accordingly, we will only consider the application of these three exceptions to required public disclosure.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure under the common-law right of privacy as section 552.101 incorporates it, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that

> information ... is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. art. 6252-17a, § 3(a)(1)). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Open Records Decision No. 579 (1990) considered whether documents reflecting an agency's investigation of allegations of sexual harassment were protected from public disclosure by a common-law right of privacy. Open Records Decision No. 579 (1990) made the following statement with respect to applying this test to the records before it:

> The facts alleged in the complaint and in the interviews are no doubt somewhat embarrassing to some of the individuals involved. However, as recognized in Open Records Decision No. 438 [concerning an allegation of an incident of sexual harassment and assault], the kind of conduct described in the interviews is not the sort of profoundly personal intrusion that places the privacy of victims of serious sexual offenses in a special context. [*See* Open Records Decision No. 339 (1982).] Moreover, the information relates to an area of public interest, *i.e.*, the working environment and on-the-job conduct of public employees. The public has a legitimate interest in knowing how its business is being conducted.

Open Records Decision No. 579 (1990) at 3. The decision concluded that the requested information was not excepted from public disclosure under the common-law prohibition against public disclosure of private facts, except for a personal message on a Christmas card apparently sent to a department employee by a former department employee.

Recently, however, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files in *Ellen* contained individual witness and victim statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d 519. The court ordered the release of the affidavit of the person under investigation, and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* at 525. The court held, however, that the names of witnesses and detailed affidavits regarding allegations of sexual harassment was exactly the kind of information specifically excluded from disclosure under the privacy exception as described in *Industrial Foundation*. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

We have reviewed the documents submitted to our office. We believe that the letter from you to Mr. Frank Hill dated September 8, 1994, explains the allegations of sexual harassment in enough detail to satisfy the public interest and must therefore be released. The individual witness statements and the identities of the witnesses must, therefore, be withheld from required public disclosure. For your convenience we have marked the information that must be withheld. We will now consider your claims that sections 552.103 and 552.111 except the remaining information from disclosure.

Section 552.103(a) excepts information:

> (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
>
> (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To be excepted under section 552.103(a), information must relate to litigation that is pending or reasonably anticipated. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Finally, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim that the requestor is representing the faculty member under investigation with an announced attempt to litigate over the matter. You further claim that "[a] settlement dialogue of sorts has occurred between counsel for [the faculty member] and this firm on behalf of [the college]." You do not explain, however, how the alleged litigation relates to the documents you submitted to this office; some of the documents consist of letters to the requestor and letters from the requestor. Clearly, section 552.103 does not apply to all of the submitted documents. You have not, therefore, met your burden to demonstrate how and why section 552.103 applies to the requested records. You may not withhold any information under section 552.103.

Section 552.111 excepts "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Section 552.111 excepts from public disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5. The policymaking functions of an agency, however, do not encompass routine internal administrative and personnel matters. *Id.* Furthermore, section 552.111 does not except purely factual information from disclosure. *Id.* As the requested information relates to a personal matter, section 552.111 does not apply.

Although you have submitted the faculty members personnel file and apparently contend it is excepted from disclosure, you do not raise any exceptions nor have you marked any of the documents. As the requestor is the legal representative of the faculty member, we do not address to what extent the personnel records may consist of information protected by privacy. *See* Gov't Code § 552.023 (special right of access to confidential information); Open Records Decision No. 481 (1987) (privacy interests arise only in context of particular individual vis-à-vis others, and are not implicated where only person himself is concerned; where person asks governmental body only for information about himself, no privacy interest arises). You may not withhold the personnel records. Except for the information marked as confidential under *Ellen*, the documents must be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/LBC/rho

Ref: ID# 29443

Enclosures: Marked documents

cc: Mr. John J. Harvey, Jr.
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(w/o enclosures)